

not have a reasonable opportunity of arresting the said ship in any of the jurisdictions indicated in the second limb of the proviso to section 8 and that being so I dismissed prayer 2 of the defendants' motion here and allowed the motion of the plaintiffs and granted the necessary leave thereby extending time till June 23, 1977 for the plaintiffs to have had a reasonable opportunity to arrest the said ship which in fact they had done and to regularise the present proceedings.

In these circumstances if on the facts here it were treated as a case not under the obligatory part of the proviso then under the first discretionary part of the proviso, I would have allowed the plaintiffs' motion and consequently dismissed the second prayer of the defendants' motion.

Before beginning to consider prayers 1 and 3 of the defendants' motion it would be convenient to set out here the relevant portions of sections 3 and 4 of the High Court (Admiralty Jurisdiction) Act.

"3.—(a) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:

- (a)
 - (b)
 - (c)
 - (d) any claim for damage done by the ship;
 - (e)
 - (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
 - (g)
- 4.—(1)
- (2)
 - (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the admiralty jurisdiction of the court may be invoked by an action *in rem* against that ship, aircraft or property.
 - (4) In the case of any such claim as is mentioned in paragraphs (d) to (g) of subsection (1) of section 3 of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship, the admiralty jurisdiction of the court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action *in rem* against —
 - (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
 - (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

Under prayer 1 of the defendants' motion their main complaint is that the claim by the plaintiffs for damages for loss of life comes under head (f) and not head (d) of section 3 of the High Court (Admiralty Jurisdiction) Act. I cannot agree with this submission as this claim quite clearly comes under head (d) as a claim for damage done by the said ship. This

claim may also be treated as a claim under head (f) but that is beside the point here.

Again a claim for damage done by a ship clearly gives rise to a maritime lien. That being so the exercise of the Admiralty jurisdiction *in rem* is under section 4(3) and not under section 4(4). We have only to consider prayer 3 of the defendants' motion if the exercise of the *in rem* jurisdiction is under section 4(4).

For these reasons prayers (1) and (3) of the defendants' motion are also dismissed.

In the result the motion of the plaintiffs is allowed and that of the defendants is dismissed. The plaintiffs shall have the costs of these motions.

Plaintiffs' motion allowed.

Solicitors: Drew & Napier; Selvadurai & Emmanuel.

THE "ANDARA" RE APPLICATION BY C.V. PALEM

[O.C.J. (Kulasekaram J.) July 4, 1978]

[Singapore — Originating Motion No. 8 of 1976]

Immigration — Seizure and forfeiture — Vessel harbouring illegal immigrants — Meaning of "vessel below 75 tons" — Ambiguity in penal provision — Adoption of construction favourable to applicant — Authority of officer making seizure in question — Immigration Act (Cap. 81), ss. 3(1) & (2), 49.

Administrative Law — Certiorari — To remove into court and quash magistrate's order.

The applicant, an organisation incorporated under Indonesian laws and having its registered office at Jakarta, Indonesia, was the owner of the ship "Andara". The said ship was engaged in a ferry service between Singapore and the Batam Islands. On March 31, 1975, immigration officials boarding the said ship discovered eleven illegal immigrants hidden in the mid-section of the ship. The master of the ship was arrested and the said ship was seized and detained by the immigration officials. Consequent on the conviction of the master, an inquiry for the disposal of the ship under section 49 of the Immigration Act (Cap. 81) was held and the subsequent order of forfeiture was made by the Magistrate. The applicant had applied for an order of *certiorari* to have the said Order of the Magistrate removed into court and quashed. He contended, *inter alia*, that the learned Magistrate had erred in holding that the word "tons" in section 49 of the Immigration Act meant the net registered tons of the said ship and in failing to hold that the said ship, having the loaded displacement of 86 tons, was not liable for forfeiture under section 49 of the Immigration Act.

Held: (1) a construction more favourable to the applicant should be adopted to resolve any ambiguity in a penal provision;

(2) when the legislature used the phrase "any vessel below 75 tons" without specifying what type of "ton" was intended it really intended the phrase to mean "any vessel whose gross registered tonnage and its displacement tonnage are both below 75 tons";

(3) before an order for forfeiture could be made there should be a proper seizure of the said ship under section 49. In this case as there was no proper evidence that the immigration officer was duly authorised by the Controller in writing, the seizure was bad and hence the forfeiture too would be bad;

(4) if there were satisfactory evidence that the vessel was used in the commission of an offence under the Immigration Act, it was immaterial whether the owner had knowledge or consented to it.

Case referred to:-

(1) *Exp. Wier* (1891), L.R. 6 Ch. App. 875 @ 879.

ORIGINATING MOTION.

Lai Kew Chai for the applicant.

Glenn J. Knight (Dy. Senior State Counsel) for the Attorney-General.

Kulasekaram J.: The applicant C.V. Palembang is an organisation duly incorporated under Indonesian Laws and having its registered office at Jakarta, Indonesia. The applicant is and was at all material times the owner of the ship known as motor vessel "Andara", hereinafter referred to as the said vessel, of the Port of Jakarta, Indonesia.

On the 27th day of September, 1975 after the conclusion of the Disposal Inquiry No. 25 of 1975 under section 49 of the Immigration Act the Magistrate, Mr. Kan Ting Chiu, made an Order for the forfeiture of the said motor vessel.

It is common ground that just before the arrest of the said vessel by the Immigration Authorities it was engaged in a ferry service between Singapore and the Batam Islands. On March 31, 1975 at 3 p.m. the said vessel was cleared by the Immigration authorities here for a voyage from Singapore to the Batam Islands. There were 26 passengers on the declared Passenger List. A little later immigration officials boarded the said vessel and on a search of it discovered eleven illegal immigrants hidden in the mid-section of the vessel. Captain Jailani bin Jasir, the master of the ship, was arrested and the said ship was seized and detained by the immigration officials. On April 2, 1975 Captain Jailani was convicted on four grounds of harbouring illegal immigrants, an offence under the Immigration Act and seven other similar charges were also taken into consideration. Consequent on the conviction of Captain Jailani this inquiry for the disposal of the said motor vessel under section 49 of the Immigration Act was held and the subsequent order of forfeiture made by the said Magistrate. The applicant has applied to this court for an order of *certiorari* to have the said Order of the Magistrate removed into this court and have it quashed. The applicant complains that such an order was wrong in law on the face of the record in that:

- (a) The learned Magistrate had erred in law in holding that the word "Tons" in section 49 of the Immigration Act (Cap. 81) meant the net registered tons of m.v. "Andara" and in failing to hold that the said vessel, having the loaded displacement of 86 tons, was not liable to forfeiture under section 49 of the Immigration Act;
- (b) The learned Magistrate had erred in law in failing to hold that the vessel was not properly seized, to wit there was no evidence that the seizing officer was authorised in that behalf by the Controller of Immigration in writing under his hand and in not holding that since the seizure was wrongful, the said vessel was not liable to forfeiture;
- (c) The learned Magistrate had erred in law in failing to hold that the said vessel was not used by the applicant in the commission of any offence, having

A regard to the fact that the Master of the vessel in harbouring the illegal immigrants was acting wholly without any authority of the applicant, as the shipowner, and that the said vessel was not liable to forfeiture.

It is convenient at the outset here to set out the provisions of section 49 (hereinafter referred to as the B said section) of the Immigration Act.

"49.—(1) Any vessel below seventy-five tons which is used in respect of which there is reasonable cause to suspect the commission of any offence against this Act or the regulations may be seized and detained by the Controller or any senior immigration officer, authorised in that behalf by the Controller in writing under his hand, at any place either on land or in the territorial waters of Singapore.

C (2) The seizing officer shall forthwith give notice in writing of such seizure and the grounds thereof to the owner, charterer or agent of the vessel so seized or detained, either by delivering such notice to him in person or by post at his place of office or abode, if known:

Provided that such notice shall not be required to be given where such seizure or detention is made in the presence of or with the knowledge of the offender or the owner or his agent, as the case may be.

D (3) Any vessel liable to seizure or detention under the provisions of subsection (1) of this section shall be liable to forfeiture.

(4) An order for the forfeiture or for the release of any vessel liable to forfeiture under the provisions of this section shall be made by the court before which the prosecution with regard thereto has been held.

E (5) An order for the forfeiture of a vessel shall be made if it is proved to the satisfaction of the court that an offence against this Act or the regulations has been committed and that the vessel was used in the commission of the offence, notwithstanding that no person may have been convicted of such offence.

(6) The Controller may sell any vessel forfeited under this section. The proceeds of such sale shall, after payment of the expenses of the sale, be applied in payment of any fine, costs, or charge incurred under this Act and any balance remaining shall be paid into the Consolidated Fund."

The first ground of complaint concerns the meaning of the phrase "vessel below 75 tons" in the said section. It is submitted that the word "ton" is not sufficiently specific and is capable of more than one meaning. When used in relation to a ship or vessel it may be used as a unit of volume or a unit of weight. G As a unit of volume a ton is equivalent to 100 cu. feet and is used mainly in connection with the registration of a ship in the shipping register. When registering a ship the total enclosed space in a ship is measured and expressed as so many tons and the amount of tons so found is registered as its "gross registered tonnage" in the shipping register. Again H the total available space for cargo in a ship is also calculated. This is computed by making certain deductions such as the space occupied by the propelling machinery of the ship and the space for crew accommodation and other like specific deductions from the total enclosed space of the ship that is its gross tonnage and the amount so computed in tons is registered as the "net registered tonnage" of the ship in the shipping register. I

As a unit of weight a "ton" is the equivalent of 2240 lbs. The total weight of a ship when it is loaded to full capacity and floating at the level of the load line is measured and is referred to as the "loaded displacement" of the ship. This simply expresses the weight of the ship with its full permissible load.

Similarly the maximum permissible weight for cargo, fuel and water is computed by deducting from the "loaded displacement" of the ship its weight when empty. The amount so computed is referred to as the "dead weight tonnage" of the ship.

It is not in dispute here that the relevant figures for the said vessel are as follows:

Gross registered tonnage	...	...	...	56.59 tons.
Net registered tonnage	...	...	...	25.10 tons.
Loaded displacement tonnage	...	...	...	...
(total weight of ship with full permissible load)	...	...	...	86 tons.
Dead weight tonnage	...	...	...	73.3 tons.

Now the question is to which of these 4 tonnages of the said vessel does the expression "below 75 tons" in the said section refer to. The applicants submit that as the said section itself is not specific on this point and as it is a penal provision a construction that is most favourable to the applicants should be adopted. That being so it is submitted that this phrase should refer to the "loaded displacement tonnage" of the vessel and the vessel therefor should be exempt from forfeiture under the section. The learned Magistrate did not accept this submission. The learned Magistrate, however, had approached the subject in a different way. He considered the definition of "tonnage" in the Merchant Shipping Act. That definition of tonnage reads:

"The tonnage in this Act referred to shall, unless the context otherwise requires, in the case of British-registered ships be the net registered tonnage, and, in the case of foreign-registered ships, shall be the tonnage of such ships denoted in their certificates of registry where an Order in Council has been made under section 84 of the Merchant Shipping Act, 1894, in respect of the country to which the ships belong, and, where no such Order in Council has been made, the tonnage of such ships as nearly as possible approximating to the net registered tonnage as measured in British-registered ships."

From that it is clear that for the purposes of the Merchant Shipping Act "ton" with reference to a ship when unspecified would refer to the net registered tonnage of the ship. The Customs Act, in particular section 102 of it, referring to similar provisions for the forfeiture of a vessel refers to the vessel as "vessel not exceeding 200 tons net registered tonnage". Here clearly there is no ambiguity at all as to the type of tonnage. A similar provision in the Dangerous Drugs Act regarding forfeiture of vessels reads:

"This section shall not apply to any ship or hovercraft of more than 200 tons net."

Here the use of the words "tons net" appear to specify that the tonnage referred to is most probably "net registered tonnage". This, however, may be a moot point for argument.

The learned Magistrate having considered these provisions in these acts took the view that the word "ton" in this section should be construed to mean "net registered tonnage". However as the section itself was not specific he considered the other tonnages as well. Of the four types of tonnages indicated above he ruled out the "loaded displacement tonnage" as not relevant because it is not in use except for architectural purposes in shipping and would have no reference to this Act. The question is was he justified in rejecting this tonnage. This tonnage referred to as "loaded displacement tonnage" is nothing more than just the total weight of the ship when loaded to its permissible load. This is certainly one way of describing a ship

just as "gross registered tonnage" represents the total enclosed space of the ship including the space occupied by the ship's propelling machinery, ship's crew accommodation and the full cargo space of the ship. In the same manner "dead weight tonnage" describes the ship's total permissible weight for cargo, fuel and water just as its space counterpart "net registered tonnage" refers to the total permissible cargo space of the ship.

Of course, "gross registered tonnage" and "net registered tonnage" are used more frequently for describing a ship rather than its two weight counterparts. They are the tonnages used for registration purposes and therefore they appear to have gained greater currency among shipping circles generally. I would have accepted one of the registered tonnages as a correct way of construing the word "tons" in the said section but for two other factors which required serious consideration. One is that as this is a penal provision a construction more favourable to the applicant should be adopted to resolve any ambiguity if it cannot be clearly resolved otherwise. Secondly here the said section was subsequently amended by Subsidiary Legislation — The Metrication (Immigration Act) Order, 1975 dated December 19, 1975 — "by deleting the words 'seventy-five tons' appearing in the first line of subsection (1) thereof and in the marginal note thereto and substituting therefor in each case the words 'seventy-six nett registered tonnes'." However, an error having been detected in the amendment, very shortly thereafter, it was further amended by — The Metrication (Immigration Act) Order, 1975 of April 9, 1976 to read "seventy-six tonnes" for "seventy-six nett registered tonnes". All that I can say about these 2 amendments is that the first was completely wrong because if the word "tons" in the said section referred to "net registered tons" a measurement of space then the alteration from 75 tons to 76 tonnes for purposes of the Metrication Act was inaccurate. The metrication equivalent in such a case would be very different.

Incidentally in International shipping this problem has been looked into in the "Convention for Uniform System of tonnage measurements, 1947" and the same unit of measure of a "ton" is used whether the measurements of the ship are taken in feet or in metres. The conversion is made so that one "ton" refers to the space of 100 cu. ft. or its equivalent in cubic metres. If measured in metres the space computed in cubic metres is converted to units of 100 cu. ft. or its equivalent in cubic metres to ascertain the tonnages. What it amounts is that whatever system of measurements is adopted, be it in feet or in metres, the tonnage measurement of that ship would be the same. In fact the word "ton" so used is such a special unit of measure used particularly for registration purposes of ships and therefore is more accurately referred to as a "register ton" and the net tonnage of a vessel is referred to as so many "register tons" — as suggested by the above mentioned Convention.

The second amendment to the said section was for "seventy-six nett registered tonnes" read "seventy-six tonnes". The full effect of both these amendments is that the original said section was now amended from "75 tons" to "76 tonnes". This is a correct

conversion only if the word "ton" in the phrase "vessel below 75 tons" refers to a measure of weight and not of space. Incidentally a metric ton which has 1,000 kilograms is simply .914 tons. That is how 75 tons converts to 76 metric tonnes. This subsidiary legislation quite clearly indicates that the "ton" referred to here is a measure of weight and not one of space.

I would be loathe to have recourse to a subsidiary legislation to construe a section of the main Act though I must confess I am not precluded from doing so having regard to the decision in *exp. Wier*,⁽¹⁾ where James and Mellish L.J.J. said "that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made... under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction". However, in all the circumstances to resolve the ambiguity I would construe that when the legislature here used the phrase "any vessel below 75 tons" without specifying what type of "ton" was intended it really intended the phrase to mean "any vessel whose gross registered tonnage and its displacement tonnage are both below 75 tons".

As the loaded displacement tonnage of the said vessel was above 75 tons it was not liable to forfeiture under the said section.

In respect of the second complaint I agree that under the said section before an order for forfeiture can be made there should be a proper seizure of the said ship under the said section.

It is common ground that the said vessel was seized by an Assistant Controller of Immigration when it was used for the commission of an offence under the said Act. The only question is did that officer have the necessary written authority either general or special of the Controller for making this seizure. Under section 3(2) of the Immigration Act for any Assistant Controller to exercise the powers and discretion vested in the Controller by the said Act he must be duly authorised in writing in that behalf by the Controller. Reading this provision with the provision in sub-section (1) of the said section for a proper seizure the officer concerned should have been duly authorised by the Controller in writing. On the evidence it is not clear whether he had such authority and if I had to make a ruling on this point I would say as there is no proper evidence before me that he had such authority the seizure here would be bad and hence the forfeiture too would be bad.

As regards the third ground of complaint if there is satisfactory evidence that the said vessel was used in the commission of an offence under the Act as here it is immaterial whether the owner had knowledge or consented to it. I see no substance in this complaint.

For these reasons this application is allowed and the order for forfeiture of the said vessel is set aside. The applicant shall have the costs of this application.

Application allowed.

Solicitors: *Lee & Lee.*

A MALAYSIAN REPORTS

BIAN CHIANG BANK BHD. v. KWONG HING CHEONG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Chang Min Tat F.J.) April 26 and June 14, 1978]

[Kuching — Federal Court Civil Appeal No. 153 of 1977]

B *Banking — Overdraft account — Claim by bank for repayment — Defence of limitation — From when time for limitation ran — Payments made to account — Revival of time for suing — Limitation Ordinance (Sarawak Cap. 49), s. 20(1).*

Practice and Procedure — Limitation — Claim by bank for repayment of overdraft account — When time for limitation would run — Payments to account — Limitation Ordinance (Sarawak Cap. 49), s. 20(1).

In this case the respondent had an overdraft account with the appellant bank. There were no terms and conditions for the loan, save as to the condition for repayment, which was necessarily to be implied. The account was opened in May 1962 and on December 31, 1971 the account stood at \$10,272.24 which was the sum claimed. The respondent had paid various sums into the account, the last payment being for \$100 in December 15, 1969. The appellant bank demanded repayment of the overdraft by notice in writing on December 15, 1971 and when this demand was not complied with, it commenced the action on February 9, 1972. The defence of the respondent was limitation, the period prescribed by the Limitation Ordinance (Cap. 49, Sarawak) being three years. The learned trial judge held that in the circumstances of this case no demand for repayment was necessary to make the overdraft an enforceable debt and that the overdraft became due and payable at the time when each loan was made. He held that the claims before February 8, 1969 were statute barred but the claims after that date were not. He also ordered that the moneys paid in by the respondent between these two dates be set off against the sum found due and owing by it to the Bank. The appellant bank appealed.

F *Held*, allowing the appeal: although the learned trial judge was correct in holding that no demand for repayment was necessary to make the overdraft an enforceable debt and that time ran from the time each loan was made, he failed to give effect to the payments made by the respondent. On a proper interpretation of section 20 of the Limitation Ordinance, it did not appear to be a matter of much importance if the payment which would make for a new period of limitation was towards interest only or towards part of the capital. If there was such a payment, it would revive the time for suing;

G (2) in this case the payment on December 15, 1969 prevented time from running out, so that on the taking out of the writ on February 12, 1972, the claim had not become statute-barred.

Cases referred to:-

- (1) *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110.
- (2) *Bradford Old Bank v. Sutcliffe* [1918] 2 K.B. 832.
- (3) *Parr's Banking Co. Ltd. v. Yates* [1898] 2 Q.B. 460.

H

FEDERAL COURT.

Patrick Tan for the appellants.

Lee Chuan Eng for the respondents.

I *Lee Hun Hoe C.J. (Borneo):* I have the advantage of reading the judgment of my learned brother, Chang Min Tat F.J., with which I concur. I would like, however, to add a few words. The facts were set out clearly in that judgment.

Appellants contended that time only began to run when demand was made and it was made on December 15, 1971. After demand, the overdraft then became an enforceable debt and time began to run from